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No. 82-581

In the Supreme Court of the United States

OCTOBER TERM, 1982

FINAU F. MILA AND ANAU S. FAINGA, PETITIONERS

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service erred in denying petitioner Fainga a permanent resident visa on the ground that she is not the "sister" of petitioner Mila, a United States citizen, because the Kingdom of Tonga, where petitioner Mila's mother allegedly adopted petitioner Fainga, does not recognized the adoption as lawful.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10) is reported at 678 F.2d 123. The opinion of the district court (Pet. App. A-13 to A-18) is reported at 494 F. Supp. 998. The decisions of the Board of Immigration Appeals (Pet. App. A-19 to A-24) and the District Director (Pet. App. A-25 to A-26) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1982. A petition for rehearing was denied on June 2, 1982 (Pet. App. A-11 to A-12). On August 25, 1982, Justice White extended the time for filing a petition for a writ of certiorari to September 30, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, Finau F. Mila and Anau S. Fainga, are natives of the Kingdom of Tonga. Mila was born in Tonga in 1945. Fainga was born legitimately in Tonga on November 14, 1949. Shortly after Fainga's birth her mother turned her over to Mila's mother, who raised Fainga to adulthood.

Mila's mother and Fainga's mother both continued to reside in Tonga. Petitioner Mila, however, is a naturalized United States citizen residing in Salt Lake City, Utah. Petitioner Fainga currently resides there with him. Mila filed an immigration preference petition benefitting Fainga, claiming that she is entitled to a permanent resident visa preference as his adopted sister, under 8 U.S.C. 1153(a)(5).[1] In order to establish a brother-sister relationship under that provision, Mila was required to show that he and Fainga are "child[ren]" of a common "parent" within the meaning of 8 U.S.C. 1101(b)(1) and (2). See *In re Clahar*, 16 I. & N. Dec. 484 (BIA 1978); *In re Gur*, 16 I. & N. Dec. 123 (BIA 1977); *In re Rehman*, 15 I. & N. Dec. 512 (BIA 1975); *In re Heung*, 15 I. & N. Dec. 145 (BIA 1974). Because Mila claimed that the requisite relationship exists by virtue of his mother's adoption of Fainga, he was required to establish that Fainga was the adopted child of his mother within the meaning of 8 U.S.C. 1101(b)(1)(E), which includes within the pertinent definition of "child":

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[1] 8 U.S.C. 1153(a)(5) provides in pertinent part:

> (a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
>
> > (5) Visas shall next be made available * * * to qualified immigrants who are the brothers or sisters of citizens of the United States * * *.

> [A] child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years * * *.

2. Respondent, the INS District Director, denied the preference petition on April 14, 1978, because Fainga would not be regarded as the adopted child of Mila's mother under the laws of Tonga, where the adoption allegedly occurred (Pet. App. A-25 to A-26). The District Director concluded (*id.* at A-26):

> The law of Tonga makes provision for the adoption of illegitimate children. However, no provision is made for the adoption of children born legitimately, and although it is customary for relatives of parents to raise and maintain their children as if the children were adopted, this does not give rise to any legal consequences and the "adoption" is not recognized.

The Board of Immigration Appeals dismissed petitioners' appeal (Pet. App. A-19 to A-24). The Board explained (*id.* at A-21 to A-22) that it had consistently held that the existence of an adoption for purposes of 8 U.S.C. 1101(b)(1)(E) turns upon whether the purported adoption is recognized as legally effective by the law of the place where it occurred. Quoting from an opinion of the Crown Solicitor for the Kingdom of Tonga, the Board concluded that a customary adoption such as occurred in this case "is not recognized as legally valid under Tongan law" (*id.* at A-23). Because petitioner Mila had not demonstrated that the Crown Solicitor's opinion misstated Tongan law, the Board upheld the denial of the preference petition.

The district court reversed the decision of the Board of Immigration Appeals (Pet. App. A-13 to A-18). Observing that customary adoptions are practiced in Tonga, and asserting that once such a customary adoption has been

consummated the natural parents cannot reacquire custody of the child by legal process, the district court concluded that Fainga qualified for an immigration preference as an adopted child of Mila's mother, *i.e.*, as his sister (*id.* at A-17 to A-18). The court concluded that the BIA's interpretation of Section 1101(b)(1)(E) was unduly restrictive because it could prevent unification of a "bona fide" family unit, contrary to what the court took to be the legislative intent (Pet. App. A-18).

3. A divided court of appeals reversed the judgment of the district court, upholding the denial of the preference petition (Pet. App. A-1 to A-10). The court initially rejected petitioners' contention that the Board of Immigration Appeals had misconstrued Tongan law (*id.* at A-5 to A-6). The court concluded that the evidence and authorities tendered by petitioners were not inconsistent with and did not overcome the statement by the Tongan Crown Solicitor cited by the Board. The court found no foundation in fact for petitioners' claim that the Board's analysis of Tongan law or its handling of customary adoptions under other legal systems unduly emphasized the inheritance rights (or lack thereof) of "adopted" children.

The court of appeals also rejected petitioners' broader contention that the Board of Immigration Appeals had misinterpreted 8 U.S.C. 1101(b)(1)(E), by making recognition under the law of the situs the test of effectiveness of a purported adoption (Pet. App. A-6 to A-7). The court explained that the Board's decision rested upon a reasonable construction of the statute that would "decreas[e] the likelihood of fraud, serving as a relatively bright line to determine which adoptions will be recognized for immigration purposes, and insuring that persons who bring adopted children into this country are legally responsible for their care" (*id.* at 7). Because the Board's interpretation was

reasonable, was not inconsistent with the pertinent legislative history, and represented a longstanding administrative interpretation of the statute by the body charged with its administration, the court of appeals sustained that interpretation.[2]

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals.[3] As the court below concluded, the Board of Immigration Appeals correctly interpreted the controlling statute and correctly applied that interpretation to the facts of this case. Further review accordingly is not warranted.

1. There is no merit to petitioners' broad contention (Pet. 5-6) that the Board of Immigration Appeals and the court of appeals gave an impermissible reading to 8 U.S.C. 1101(b)(1)(E) by requiring that a purported adoption be recognized under the law of the situs country in order to be effective for purposes of this branch of the statutory definition of "child." Contrary to petitioners' claim (Pet. i), this interpretation of the statute does not add an "extra-statutory requirement." For purposes, inter alia, of a preference application under 8 U.S.C. 1153(a)(5), Section 1101(b)(1)(E) treats as a child a person who is: "[(1)]

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[2]Judge McKay dissented, taking issue with the majority's view of Tongan law (Pet. App. A-8 to A-10), and urging more generally that 8 U.S.C. 1101(b)(1)(E) requires the INS to "review foreign adoptions with an eye to preserving genuine family relationships" (Pet. App. A-8).

[3]Petitioner claims (Pet. 10-13) that the decision below conflicts with the decisions of several other courts of appeals. The purportedly conflicting decisions, however, are actually ones rejecting the INS's interpretation of other statutory provisions. They demonstrate at most that the INS is not invariably sustained on questions of statutory interpretation. But the views of the INS are entitled to substantial deference. Cf. *INS* v. *Wang*, 450 U.S. 139, 144 (1981). The fact that it has not been upheld on every occasion is scarcely sufficient to occasion review here.

adopted [(2)] while under the age of fourteen years [(3)] if the child has thereafter been in the legal custody of, and [(4)] has resided with, the adopting parent or parents for at least two years" (emphasis added). The term "adopted" is one of the statutory requirements. Yet this term is "not self-explanatory, and reasonable men could easily differ as to [its] construction" (*INS* v. *Wang*, 450 U.S. 139, 144 (1981)). The longstanding and consistent view of the Board of Immigration Appeals that the validity of an adoption for immigration purposes is to be governed by the law of the place where the adoption occurred[4] is thus merely an interpretation of the statutory requirements.[5] Accordingly, the INS' views on this question are entitled to substantial deference. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153 (1946).

Nor is the BIA's interpretation of the statute an unreasonable one. Plainly some criterion is needed to distinguish adoptions from the infinite variety of more informal arrangements for child-rearing by persons other than a natural

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[4]See, *e.g.*, *In re Kwok*, 14 I. & N. Dec. 127 (BIA 1972); *In re B*, 9 I. & N. Dec. 521 (BIA 1961); *In re R*, 6 I. & N. Dec. 760 (BIA 1955).

[5]Contrary to petitioners' suggestion (Pet. i, 5-6), the INS has not declined to recognize any and all customary adoptions under Section 1101(b)(1)(E) and it has not restricted recognition to adoptions accomplished by a judicial act. Rather, the test is whether a customary adoption is regarded as legally valid by the law of the nation where the purported adoption occurred. See *In re Kwok*, *supra*, 14 I. & N. Dec. at 130; see Pet. App. A-4. As the Board explained in *In re B*, *supra*, 9 I. & N. Dec. at 521-522:

> [I]n the absence of a statutory procedure of adoption, the petitioner must establish that a custom existed * * * which was recognized officially as resulting in a legal adoption, legally binding upon the parties concerned, and * * * that the adoption of the beneficiary by the petitioner conformed with these customs and resulted in a legal adoption.

parent that exist in various nations. The criterion adopted by the Board, resting as it does upon the legal effectiveness of the acts (claimed to effect an adoption) where consummated, is a familiar one in the law, especially the law of domestic relations. Therefore, it cannot be regarded as contrary to congressional intent absent some clear indication in the legislative history.

The legislative history cited by petitioners (Pet. 9) does not supply any such indication. Although petitioners assert that these materials reflect an intent "that the Act be liberally construed to recognize bona fide family relationships and preserve genuine family units," they actually shed no light at all upon the question presented here. Petitioners do not suggest that the statements quoted address the narrow question of the proper interpretation of the term "adopted" in Section 1101(b)(1)(E). And while there are references to a policy of family preservation in the legislative history,[6]

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[6]Petitioners' reliance (Pet. 9) on certain legislative history materials, *e.g.*, H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7-8 (1957), is misplaced. The pages cited pertain to Section 2 of the House bill, H.R. 8123, 85th Cong., 1st Sess. (1957), which dealt with the status of illegitimate children, and did not touch upon the treatment of adopted children at all. The present 8 U.S.C. 1101(b)(1)(E) was derived not from the House bill, which was not enacted, but from its Senate counterpart, Section 2 of S. 2792, 85th Cong., 1st Sess. (1957), which passed in its stead. The accompanying report sheds little light upon the meaning of the term "adopted," although it stated that the bill contains "[a]dequate safeguards * * * to prevent abuse." S. Rep. No. 1057, 85th Cong., 1st Sess. 4 (1957). There is nothing in the Senate Report that would suggest that Congress assigned a special, non-legal meaning to the term "adopted," such as petitioners suggest. Section 1 of the House bill did address the status of adopted children, albeit in a manner somewhat different from the Senate bill. To the extent that it is relevant to the Act as it emerged, the House Report undercuts petitioners' argument. The report reveals that the focus of congressional concern was to facilitate "adopti[on of] alien orphans and offering them the benefits and the loving care of American homes." H.R. Rep. No. 1199, *supra*, at 4-5. In this context Congress understandably did not focus upon the meaning of the term

these statements do not suggest that the legal status of a purported adoption in the place where it occurred is to be disregarded in determining whether a collection of individuals should be regarded as a "family." Nor is there anything in the legislative history that suggests that the INS or a court is to determine the existence of a family relationship on a case-by-case basis by assessing the genuineness of family feeling—the alternative criterion petitioners suggest. As the court of appeals recognized (Pet. App. A-7), any such inquiry would be highly subjective, administratively burdensome, and an invitation to fraud. There is no reason to believe that Congress required the use of such an approach.[7]

2. Petitioners' contention (Pet. 6-10) that the Board misinterpreted Tongan law was correctly rejected by the court of appeals for the reasons stated (Pet. App. A-5 to A-6). Assuming, as petitioners claim, that Tongan law does not permit a natural parent to reacquire through legal process

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"adopted." The use of that term, however, presumably contemplates that anyone adopting a child abroad or bringing the child to the United States for purposes of adoption should employ legally effective procedures.

[7]There is no evidence to support petitioners' assertion (Pet. 5-6) that the Board's interpretation of 8 U.S.C. 1101(b)(1)(E) has separated functioning families. We note that the Board's ruling in this case has no such onerous result. Petitioner Fainga is a 33-year-old adult, who wishes to reside in Utah with her 37-year-old cousin. The "adoptive mother," however, continues to reside in Tonga.

As the court of appeals recognized (Pet. App. A-7), the Board's interpretation of Section 1101(b)(1)(E) has the virtue of providing adoptive parents a much higher degree of certainty as to whether a purported adoption will be recognized for immigration purposes by the United States than does petitioners' alternative criterion. Persons wishing to immigrate to the United States with adopted children are benefitted by the enhanced predictability of determinations made pursuant to the Board's interpretation of the statutory definition.

custody of a child once surrendered to another for customary adoption, it does not follow that Tongan law treats the customary adoption as legally effective to create general parental rights in the adopting parent. As explained above (pages 5-6), the requirements that the child seeking an immigration preference be "adopted" and that the adopting parent have legal custody of the child are separate elements of the showing required by 8 U.S.C. 1101(b)(1)(E). To treat legal custody as establishing an adoption would accordingly frustrate the legislative intent.

Petitioners' contention respecting custodial rights under Tongan law rests upon a single reported decision rendered in 1911, refusing to award custody of an illegitimate child to the boy's paternal grandfather. In that case, the mother had given the boy to another to raise him, and the father had neither acknowledged nor supported him.[8] The natural mother apparently had done nothing to revoke her decision that her son should be raised by the third person, and the custodian of the child apparently had not indicated a willingness to surrender him. The court's refusal to award custody to the grandfather rested upon the father's lack of parental rights and lack of equity. The decision plainly does not establish that the parental rights of the legitimate parent are severed by a customary adoption; indeed, it appears to suggest the contrary.

Contrary to petitioners' suggestion (Pet. 8), the Board's interpretation of Tongan law does not place improper emphasis upon the lack of inheritance rights of children adopted by custom. While the Crown Solicitor's opinion does state that a customary adoption gives rise to no interest in the estate of the "foster parent," it also specifies that such

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[8]The text of the opinion in question, *In re Lolesio*, 1 Tongan Law Reports 14 (1911), is reproduced in its entirety in Judge McKay's dissenting opinion in the court of appeals (see Pet. App. A-9).

an "adoption" is "not recognized as legally valid under Tongan law" (Pet. App. A-22 to A-23). The Board and the court of appeals properly relied upon the latter statement.[9] In any event, petitioner's contention respecting Tongan law does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]The Crown Solicitor's use of the term "foster parent" (Pet. App. A-22) to describe the "adoptive" parent is also revealing.

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